Case No. 82-140

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IN THE

Supreme Court of the United States

OCTOBER TERM OF 1981

ANGEL SUAREZ & JESUS COCA,
Petitioners,

v.

STATE OF OHIO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE PERIOD OF ACTUAL INCARCERATION OF EIGHTEEN MONTHS PROVIDED IN SECTION 2925.03, OHIO REVISED CODE, FOR OFFENDERS CONVICTED OF TRAFFICKING IN DRUGS UNDER SECTION 2925.03 (A) (4), OHIO REVISED CODE, A THIRD DEGREE FELONY, VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES AND THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT FOUND IN THE EIGHTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

II. WHETHER A STATE STATUTE WHICH PROVIDES MORE OR LESS SEVERE CRIMINAL PENALTIES FOR POSSESSION OR SALE OF A CONTROLLED SUBSTANCE BASED UPON THE QUANTITY POSSESSED OR SOLD BUT WITHOUT REGARD TO THE PURITY OF THAT COMPOUND, AFFORDS AN ACCUSED DUE PROCESS AND EQUAL PROTECTION OF THE LAW.

III. WHETHER A LITIGANT MAY CHALLENGE THE CONSTITUTIONALITY OF A STATE PENAL STATUTE, BASED NOT UPON THE APPLICATION OF THE STATUTE TO THE ACTUAL FACTS IN LITIGATION, BUT UPON HYPOTHETICAL FACT PATTERNS.

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OPINIONS BELOW

The opinions below are adequately set forth in the petition.

JURISDICTION

Jurisdiction is claimed under 28 U.S.C § 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment, Eighth Amendment and Ohio Revised Code Section 2925.03 are adequately set forth in the petition.

OHIO REVISED CODE SECTION 2925.01 (D)

(D) "Actual incarceration" means that a person is required to be imprisoned for the stated period notwithstanding any contrary provisions for suspension of sentence, probation, shock probation, parole, and shock parole, except that a person may be transferred from an institution operated by the department of rehabilitation and correction to the custody of the department of mental health or the department of mental retardation and developmental disabilites, as provided in section 5120.17 of the Revised Code, and shall be credited with all time served in the custody of the department of mental health or the department of mental retardation and developmental disabilities against the period of actual incarceration. An offender serving actual incarceration is eligible for diminution of his minimum sentence pursuant to section 2967.19 of the Revised Code if confined in a state penal institution or pursuant to criteria established by the adult parole authority pursuant to division (E) of section 2967.01 of the Revised Code if

confined in a state reformatory institution, which in either case shall be calculated on a minimum term which is the period of actual incarceration.

STATEMENT OF THE CASE

Petitioners were indicted by the Franklin County, Ohio Grand Jury on December 3, 1980, and charged with aggravated trafficking in controlled substances, Ohio Revised Code Section 2925.03 (A) (7). Petitioners were charged with selling or offering for sale, cocaine, in an amount equal to or exceeding three times the bulk amount. The bulk amount of cocaine as set by statute is ten grams. The bag of cocaine sold by petitioners to undercover police narcotics agents weighed sixty-eight grams and was represented to the police to be eighty-six percent pure. Selling or offering to sell a Schedule II controlled substance (cocaine) in an amount equal to or exceeding three times the bulk amount is a first degree felony. Ohio Revised Code Section 2925.03 (C) (6). The penalty for violation of that penal code is imprisonment for a term of seven to twenty-five years with actual incarceration of seven years.

On July 15, 1981, petitioners entered no contest pleas to the stipulated lesser included offenses of trafficking in drugs, Ohio Revised Code Section 2925.03 (A) (4), possession of cocaine in at least bulk amount but less than three times bulk amount, a felony of the third degree. Petitioners were found guilty and sentenced to terms of eighteen months to ten years imprisonment with eighteen months actual incarceration. Ohio Revised Code Section 2925.03 (C) (4).

At the trial court and throughout state appellate review, petitioners unsuccessfully urged that their sentences

violated the Equal Protection and Due Process Clauses and amounted to cruel and unusual punishment.

The Ohio Court of Appeals for Franklin County, Tenth Appellate District, unanimously affirmed petitioners' conviction and sentence on December 31, 1981. The Ohio Supreme Court declined further review on April 28, 1982.

SUMMARY OF ARGUMENT

The actual incarceration provisions of Section 2925.03, Ohio Revised Code, constitute a reasonable exercise of the police power of the state and advance a legitimate state interest. The imposition of a term of actual incarceration for drug trafficking offenses is not an unreasonable or arbitrary classification and does not violate the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States. A term of eighteen months actual incarceration included in a sentence for a third degree felony drug trafficking offense is not a cruel and unusual punishment under the Eighth Amendment of the Constitution of the United States. There was no constitutional defect in the application of the Ohio statutes which prohibit trafficking in drugs to the facts of petitioners' cases. Petitioners do not have standing to argue that the statutes would be unconstitutional if applied to third parties in hypothetical situations.

ARGUMENT

I. A. While under the Constitution, all laws of a general nature must have uniform operation, there is inherent power in the legislature to create classifications of persons and, if such classifications are reasonable, the constitutional requirement is satisfied. Legislative cate-

gories must be respected if the distinctions drawn have some basis in practical experience or if some legitimate state interest is advanced. *McGinnis* v. *Royster*, 410 U.S. 263 (1973).

An exercise of the police power is valid if it bears a real and substantial relation to the public health, safety, morals or general welfare and if it is not unreasonable or arbitrary. The burden is upon the party attacking the legislative classification to demonstrate that it is erroneous and to negative every conceivable basis which might support it. *Madden* v. *Kentucky*, 309 U.S. 83 (1940).

The actual incarceration provisions for drug offenses constitute a reasonable response on the part of the legislature to deal with the growing problem of the sale and distribution of illegal narcotics and to deter potential offenders. Such penalties are a rational and valid exercise of the state's power to protect the public health, safety and welfare. The states have wide latitude in fixing punishment. *Williams* v. *Illinois*, 399 U.S. 235 (1969).

This Court has observed that the history of drug and narcotic legislation in this country ". . . reveals the determination of Congress to turn the screw of the criminal machinery-detection, prosecution, and punishment, tighter and tighter." *Gore* v. *United States*, 357 U.S. at 390 (1958) as quoted in *Albernaz* v. *United States*, 450 U.S. 333, 101 S. Ct. 1137, 1144 (1981).

"[T]he comparative gravity of criminal offenses, and whether their consequences are more or less injurious, are matters for the state itself to determine." *Collins* v. *Johnson*, 237 U.S. 502 (1915). See *Pennsylvania* v. *Ashe*, 302 U.S. 51 (1937).

The Ohio Legislature has concluded that drug trafficking offenses are serious enough to merit the sanction of a period of actual incarceration. The eighteen month period of actual incarceration imposed upon petitioners under

Ohio Revised Code Section 2925.03 was not in violation of the Equal Protection Clause.

B. Petitioners further contend that the actual incarceration period of eighteen months violates the Eighth Amendment prohibition against cruel and unusual punishment.

No static test can exist by which courts determine whether conditions of confinement are cruel and unusual, since the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Rhodes* v. *Chapman*, 452 U.S. 337, 101 S. Ct. at 2398 (1981) citing *Trop* v. *Dulles*, 256 U.S. 86 (1957). The Eighth Amendment proscribes punishments grossly disproportionate to the severity of the crime. *Ingraham* v. *Wright*, 430 U.S. 651 (1977). However, a state has wide latitude in fixing punishment for state crimes, and the severity of penalties is a matter for legislative determination. *Williams* v. *Illinois*, 399 U.S. 235 (1969); *Rummel* v. *Estelle*, 445 U.S. 263 (1980). It is also within the province of the legislature to establish the terms of parole eligibility.

The period of actual incarceration of eighteen months included in the petitioners' eighteen month to ten year sentence for trafficking in drugs is not a penalty grossly disproportionate to the severity of the crime. Actual incarceration, defined in Section 2925.01 (D), Ohio Revised Code, is a reasonable legislative measure to aid in the deterrence of illegal drug dealing, and does not constitute cruel and unusual punishment.

II. A party has standing to challenge the constitutionality of a statute only insofar as it has adverse impact upon his own rights. As a general rule, if there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that the statute would be unconstitutional if applied to third parties in

hypothetical situations. *County Court of Ulster County* v. *Allen*, 442 U.S. 140, 99 S. Ct. 2213, 2223 (1979). See *Broadrick* v. *Oklahoma*, 413 U.S. 601(1973). The limited exception involving statutes broadly prohibiting speech protected by the First Amendment is not involved in the within cause.

In prosecutions under the drug abuse provisions of 21 United States Code Section 841, there is no necessity to establish the precise percentage of purity of the controlled substance as petitioners herein urge. *United States* v. *Woods*, 568 F. 2d 509 (6th Cir., 1978), certiorari denied, 435 U.S. 972. As observed by the Ohio Court of Appeals: "Even if bulk amount was based on the amount of pure cocaine, the evidence indicates that there was more than the bulk amount in the analyzed bag." (Opinion below, petitioners' brief, page 27.) No facts have been provided which would suggest an improper application of the statute involved in this case. A court will not indulge in attacks upon the constitutionality of a statute based upon conjecture and possible fact pattern. *County Court of Ulster County* v. *Allen, supra.*

Petitioners bear the burden of proof of the unconstitutionality of the statute in question. They have not demonstrated that the statute in question was improperly applied in their case.

CONCLUSION

For the reasons advanced in the foregoing brief of respondent, it is respectfully submitted that the writ of certiorari should not issue in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 28 of the Rules of Practice of this Court, I hereby certify that three copies of the foregoing Brief of Respondent in Opposition to Certiorari were served upon petitioners, Angel Suarez and Jesus Coca, by forwarding three copies of the brief to their counsel, Mr. John R. Louden, 536 South High Street, Columbus, Ohio 43215; by United States mail, postage prepaid, this 19th day of August, 1982. I hereby certify that all parties requested to be served have been served and that I am a member of the Bar of the Supreme Court of the United States.

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Member of the Bar of the
Supreme Court of the United
States